

The Administrative Law Judge (ALJ) found that claimant had suffered a series of work-related injuries ending on August 5, 2001; that claimant was not temporarily totally disabled at any time; and that claimant is not entitled to a work disability but is entitled to a permanent partial disability award based upon a 7 percent functional impairment to the body as a whole.

The claimant appeals, claiming the ALJ erred in finding he was not entitled to temporary total benefits. Claimant also contends he is entitled to a 57.5 percent work disability award, which he computed using a 62 percent wage loss and the 53 percent task loss opinion of Dr. Paul Stein.

Respondent also appeals, contending all temporary total disability benefits paid to claimant should be reimbursed to respondent by the Workers Compensation Fund. Respondent also argues that claimant only sustained a scheduled injury to his right shoulder; therefore, a work disability is inappropriate and any award should be limited to his functional impairment. Respondent also notes that the report and testimony of Dr. C. Reiff Brown, who performed an independent medical examination (IME) of claimant, indicate that claimant's neck problems are not related to the shoulder injury. Furthermore, even Dr. Stein, who examined claimant at the request of claimant's attorney, testified that when he examined claimant, claimant's neck problems had no radiating component and the range of motion of claimant's neck was essentially normal. Therefore, respondent argues claimant's injury should be restricted to a scheduled right shoulder injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began employment with respondent as a patrolman in March 1996. He has a history of injuring his right shoulder and right side of his neck in August 1996 during a softball game that was part of defense tactic time at the highway patrol training center. Claimant thought he had just pulled a muscle and did not immediately seek medical treatment. However, problems persisted with claimant's right shoulder, and he sought treatment in November 1997.

Eventually, claimant filed a workers compensation claim, Docket No. 259,909, claiming a series of injuries ending October 24, 2000. During the course of that workers compensation claim, claimant was seen by Dr. Donald D. Davis for an IME. Dr. Davis' report indicated that claimant had reached maximum medical improvement and found there was no reason claimant could not return to his job with respondent. As a result, a preliminary order dated December 7, 2000, in Docket No. 259,909 denied claimant's preliminary hearing request for temporary total disability, and claimant did not receive any further medical treatment.<sup>1</sup>

---

<sup>1</sup>P.H. Trans. (Nov. 14, 2001), Resp. Ex. 1, P.H. Order; R.H. Trans. at 7.

Claimant returned to work for respondent on February 8, 2001. Claimant testified that he began having problems with his right shoulder again. Claimant said his shoulder would lock when he would reach to the right seat of his patrol vehicle to remove items, which he claimed he did 40 to 50 times per day. He also said his problems were aggravated during truck inspections when he pulled himself up into the cab, and during shooting practices. Claimant stated that by August 2001, his symptoms had gotten much worse. On August 5, 2001, he reported his problems to his immediate supervisor. Claimant's supervisor immediately took him off work and instructed him to do what he had to do, keep him informed and bring him documentation.

Neither his supervisor nor anyone from respondent told him to go to a specific doctor. Claimant initially went to Dr. Theodore J. Clarke, who recommended follow-up with Dr. Ted Parks, an orthopedic surgeon who specialized in shoulders. Dr. Clarke restricted claimant from work until he saw Dr. Parks. Claimant saw Dr. Parks on August 27, 2001, at which time Dr. Parks provided claimant with a slip containing restrictions. Claimant testified he provided this restriction slip to respondent and was not offered any employment with respondent within those restrictions. Eventually, claimant filed this current workers compensation claim alleging a series of accidents "[e]ach and every working day through August 5, 2001."<sup>2</sup>

Before and during the time claimant worked for respondent, he also owned and managed a trucking business, which was incorporated on January 25, 2001. At the time of the incorporation, the business owned three trucks and had three drivers. Currently, the corporation owns five trucks and employs five drivers. At the November 14, 2001, preliminary hearing, claimant testified that he does not draw a salary from the trucking business and that he spent about four hours a week at the business doing payroll. On cross-examination, claimant admitted that he does drive the trucks, but only to move them from the shop to his office, and that he arranges for maintenance on the trucks.

Dr. Brown, a board certified orthopedic surgeon, examined claimant on January 17, 2002, for an IME ordered by the ALJ. Dr. Brown's impression was that claimant wanted to retire from respondent and was making the most out of the injury. Dr. Brown testified it was his opinion that claimant's neck problems were not related to his work. He said that in order for one movement to injure claimant permanently, he would have to do it at least 30 to 50 times a day. Nevertheless, Dr. Brown said that claimant needed additional treatment with a shoulder specialist. Dr. Brown found that claimant was temporarily totally unable to engage in his employment with respondent beginning August 4, 2001, until a point in time when he is recovered from any additional treatment.

---

<sup>2</sup>Form K-WC-E-1 (Oct. 17, 2001).

Claimant was eventually authorized to obtain treatment from Dr. Brent Adamson in Kearney, Nebraska, where claimant now resides. After diagnostic testing, Dr. Adamson performed outpatient surgery on claimant's right shoulder in October 2002. After surgery, claimant participated in a course of physical therapy. Dr. Adamson performed rotator cuff repair surgery in November 2003. Claimant testified he was released from Dr. Adamson's treatment as having reached maximum medical improvement in March 2004. Claimant also complained of neck problems to Dr. Adamson, specifically limited range of motion, stiffness and headaches. Claimant testified that Dr. Adamson examined him for his neck complaints but did not provide any treatment because it was not his area of expertise.

Claimant was seen by Dr. Paul Stein, a board certified neurological surgeon, on April 19, 2004, at the request of claimant's attorney. Dr. Stein testified claimant had a history of an injury to his right shoulder in 1996 and had aggravated that injury on a repetitive basis with his work activity. Claimant also complained of neck discomfort and cervicogenic headache. Dr. Stein testified that there were two parts to claimant's shoulder injury, an original injury and an aggravation of that injury. Dr. Stein testified that the aggravation claimant suffered was of a continuous nature through his last day of work. In relation to claimant's shoulder, Dr. Stein testified claimant had crepitus at the acromioclavicular joint, which Dr. Stein rated at 3 percent. Dr. Stein gave claimant a 5 percent whole person impairment for his cervical discomfort and mild limitation of range of motion. Dr. Stein converted the impairment rating to the right upper extremity to a whole body rating to allow for combining, and gave the claimant a 7 percent impairment rating to the body as a whole based upon the *AMA Guides*<sup>3</sup>. Dr. Stein testified that claimant should avoid repetitive activity with the right arm at or above shoulder level.

Claimant did not tell Dr. Stein when his neck problems began, but Dr. Stein's report indicates that claimant had neck pain as far back as 2000. Dr. Stein did not find any radiating pain that originated in the neck. Claimant did not give Dr. Stein a history of his neck pain getting worse during the year 2001. In discussing claimant's range of motion in his neck, Dr. Stein testified claimant primarily had restriction in extension of 35 degrees; normal according to the *AMA Guides* would be 60 degrees. Claimant had some mild decrease of rotation, having 70 degrees when normal is considered to be 80 degrees. Claimant had flexion of 50 degrees, which is normal. Dr. Stein did not find any actual muscle spasm and observed no muscle guarding in claimant. Dr. Stein acknowledged that his opinion relating claimant's neck injury to his work activities was based only on claimant's description of his job, particularly that all of claimant's

---

<sup>3</sup>American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

equipment was to his right in the patrol car and he had to do a great deal of twisting and turning, particularly to the right. Dr. Stein testified he had no reason to question claimant's veracity and had no reason to believe claimant was magnifying his complaints.

When asked about restrictions concerning claimant's neck problems, Dr. Stein testified that claimant should avoid repetitive overhead work, meaning more than 25 times an hour. Dr. Stein testified that the shoulder restrictions also restrict claimant's neck motion; if claimant cannot use his arm over his shoulder, he should not be doing overhead work. Nevertheless, Dr. Stein said that claimant could drive a truck.

Dan Zumalt is a vocational rehabilitation consultant who saw claimant on behalf of the respondent. Mr. Zumalt prepared a list of tasks claimant had performed over the 15 years of employment prior to his injury of August 5, 2001. In addition to visiting with claimant, Mr. Zumalt verified the tasks listed on the task list with respondent. Mr. Zumalt testified that with claimant's background, he would be able to find positions as a first-line supervisor or manager of transportation and materials-moving machines and vehicles. Mr. Zumalt testified claimant was capable of earning a wage of \$20.19 per hour with an additional \$1.46 per hour for fringe benefits. Using an average weekly wage of \$842, Mr. Zumalt opined that claimant would have no wage loss.

Monty Longacre is a vocational rehabilitation counselor who met with claimant at the request of claimant's attorney on April 29, 2004. Mr. Longacre developed a task list for claimant using the Revised Handbook for Analyzing Jobs which contained 19 nonduplicative tasks. Mr. Longacre also performed some labor market research in central southern Nebraska concerning availability of jobs. He disagreed with Mr. Zumalt's wage loss opinion, stating that his labor market research found that the jobs Mr. Zumalt stated claimant would qualify for were not available in the job market. Mr. Longacre testified that claimant could reasonably expect to earn \$8 per hour or \$320 a week, which, utilizing the stipulated average weekly wage of \$842, computes to a wage loss of 62 percent.

Dr. Stein reviewed Mr. Longacre's task list and testified that of the 19 tasks on the list, claimant cannot do 10 of them, which calculates to a task loss of 53 percent. When asked if claimant could work in law enforcement, Dr. Stein testified that with claimant's right shoulder injury, he would have a greater chance of reinjuring his shoulder as a patrolman than if he were, for example, a homicide detective, where there was less chance of being in a street fight. Dr. Stein also reviewed the task list prepared by Mr. Zumalt, but testified that Mr. Zumalt's report did not provide enough information for him to know how much overhead work was being done by claimant.

Lt. Kevin Winston is a field supervisor for respondent and was claimant's supervisor. Lt. Winston reviewed Mr. Zumalt's task list and testified that claimant

probably overstated the amount of time he spent a day directing traffic. Lt. Winston testified that claimant only worked four accidents during the period he worked in 2001. Only one of those accidents was an injury accident, so claimant also overstated the amount of time he spent providing first aid and assisting an EMT. Lt. Winston also testified that restraining and arresting individuals was not a daily activity; claimant only made 7 arrests in the 120 days he worked in 2001. Lt. Winston questioned claimant's task of minor vehicle maintenance, unless this meant washing his car or popping the hood to check fluids. When describing truck inspections, Lt. Winston said that unless an officer would have probable cause of a criminal activity or consent from the driver, a patrolman was not allowed to crawl into the cab of a truck. Most truck inspections involve checking the permits, log book and safety equipment. Lt. Winston also testified that claimant did not complain of continuing problems with his shoulder until August 2001, when he asked to take medical leave.

The record contains extensive testimony concerning the claimant's trucking business, including testimony about the amount of time claimant spent working at his trucking business, the number of activities claimant performed, and the value of the trucking business. Amber Wine, a certified public accountant, testified that the corporation's gross receipts increased from \$339,244 in 2001 to \$625,597 in 2003.<sup>4</sup> Ms. Wine also testified that in 2002, the corporation owned a \$10,000 certificate of deposit. Claimant did not draw any income from the corporation in 2001 or 2002, but in 2003, he drew \$5,812.

Several of claimant's drivers also testified. Bill Cropp testified that claimant's trucking business does not work exclusively with FedEx, as Mr. Cropp makes runs from Lincoln, Nebraska, to Texas, and none of his routes are related to FedEx. Nick Sander testified that claimant traveled with him on some training runs, two of them being to Portland, Oregon. Mr. Sander testified that when they traveled to Oregon, claimant did some of the driving. Brian Smith testified that he began working as a driver for claimant in July 2002. When he started, claimant rode with him for about four days. Mr. Smith did most of the driving, but claimant did some. David Bledso testified he has worked for claimant about six years. When he began working for claimant, claimant was operating the trucking business and working full time for respondent. Almost all of Mr. Bledso's driving is for FedEx, although he may have delivered a trailer for one of claimant's other customers.

Claimant received temporary total benefits from January 2002 until several months prior to the regular hearing. During this time, claimant had been performing duties with his trucking corporation. Since August 5, 2001, claimant has driven the trucks, mostly

---

<sup>4</sup>Wine Depo. at 5.

to move a truck from the shop to the office. Recently, however, he occasionally has driven them to Kansas City, Kansas.

Upon his release from care by Dr. Adamson, claimant did not return to work for respondent. He testified he had previously received communication from respondent that he had been terminated. Claimant testified that he has looked for law enforcement work in Nebraska, Kansas, Wyoming, North Dakota and Montana and is continuing his job search. He has applied for a job as a dispatcher for a trucking company and an entry level management position for another trucking company.

The ALJ found claimant had a 7 percent general body disability based upon the combined impairment ratings to the right shoulder and neck given by Dr. Stein. The ALJ denied claimant any temporary total disability compensation and further denied claimant any work disability because Dr. Stein said claimant could drive a truck and perform all of the office work that he had been performing for his company.

The claimant owns a trucking company that has 5 trucks and 5 drivers. This is an increase of at least one truck and driver since the inception of this claim. The claimant is qualified to operate a truck and in fact does so when needed. There has not been any substantial testimony provided that would show that the claimant is unable to perform this type of work. In fact, Dr. Stein specifically stated that the claimant was able to perform this type of activity and the claimant has driven a truck when necessary. The claimant testified that he had driven the trucks periodically since August 6, 2001. It is clear from the testimony that the claimant could make 90% or more of his pre-injury average weekly wage. The claimant is not entitled to a work disability since he has made the choice not to work in the position as a truck driver which is available to him. Further, the claimant was not entitled to temporary total disability benefits as he testified that at all times since he left the employ of the respondent, he worked for his own company including driving the trucks. Based on this testimony, the claimant was not temporarily total disabled at any time.<sup>5</sup>

The Board agrees that claimant could probably have driven a truck for his own company and earned at least 90 percent of the average weekly wage he was earning from his employment with respondent. And claimant could probably have earned this amount on top of what he was earning from his trucking business as the owner. However, there was a period of time when claimant was recovering from his shoulder injury when he probably could not have driven a truck. Nevertheless, he was not "rendered completely and temporarily incapable of engaging in any type of substantial

---

<sup>5</sup>Award (Nov. 23, 2004) at 6-7.

and gainful employment”<sup>6</sup> because he was still capable of performing his actual job duties with the trucking company. Claimant probably would have met the definition of being temporarily partially disabled under K.S.A. 44-510e but for the fact that claimant’s injuries did not result in a general body disability.<sup>7</sup> Instead, the Board finds that claimant’s work-related permanent disability is limited to the right shoulder and is a scheduled injury under K.S.A. 44-510d(a)(13). The Board is not persuaded that claimant’s cervical problems constitute a permanent impairment nor that the cervical condition was permanently aggravated by claimant’s work with respondent during the period alleged. Finally, the Board finds that claimant’s impairment is 3 percent to the level of the shoulder based upon the rating by Dr. Stein. Respondent argues that a portion of this impairment preexisted claimant’s series of accidents beginning February 8, 2001<sup>8</sup>, and ending August 5, 2001, but respondent has failed to prove the percentage of claimant’s preexisting impairment, if any.<sup>9</sup>

Finally, respondent requests an order for reimbursement from the Workers Compensation Fund for its overpayment of temporary total disability compensation and of medical treatment expenses for conditions not related to the accident and injury that is the subject of this claim. Respondent is referred to the Director of the Division of Workers Compensation for a determination of what reimbursement is appropriate.<sup>10</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 23, 2004, is modified as follows: The claimant is entitled to 6.75 weeks of permanent partial disability compensation, at the rate of \$417 per week, in the amount of \$2,814.75 for a 3 percent

---

<sup>6</sup>K.S.A. 44-510c(b)(2).

<sup>7</sup>See, e.g., *Blocker v. City of Topeka*, No. 1,002,440, 2004 WL 2046743 (Kan. WCAB Oct. 14, 2004); *Castro v. Francis Casing Crew, Inc.*, No. 1,015,853, 2004 WL 2046743 (WCAB Aug. 6, 2004); *Mitchell v. Wal-Mart*, No. 264,567, 2001 WL 893620 (WCAB July 27, 2001); and *Ledbetter v. Constar Plastic’s*, No. 205,252, 1996 WL 670520 (WCAB Oct. 2, 1996).

<sup>8</sup>Although claimant’s Application for Hearing did not give a starting date for the alleged series of accidents, the parties stipulated to February 8, 2001, as the starting date at the Regular Hearing (July 12, 2004) at 5.

<sup>9</sup>See K.S.A. 44-501(c); *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001); and *Taylor v. Wal-Mart*, No. 1,000,559, 2004 WL 3094634 (WCAB Dec. 15, 2004).

<sup>10</sup>K.S.A. 44-534a(b).



loss of use of the right shoulder, making a total award of \$2,814.75, all of which is due and owing less amounts previously paid.

The Board adopts all other findings, conclusions and orders of the ALJ to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2005.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director